

# An Internal Safety Net for the Council of Europe?

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As the Interlaken Process is coming to its end, the reform process at the Council of Europe is far from over. Following the institutional crisis over the barely averted [Ruxit](#), the Committee of Ministers (CM), the Parliamentary Assembly (PACE), and the then-Secretary General Thorbjørn Jagland stressed the need to develop a [complementary joint procedure](#) in response to a serious violation by a member state of its statutory obligations in the Council of Europe. This new instrument aims to safeguard both the core values and the continued functioning of the Council of Europe – clearly [a Herculean, but crucial task](#) in times of rising authoritarianism in its midst. In order to establish a credible safety net against threats from within the Council of Europe, the joint procedure must not only be legitimate and efficient in theory, but also be practical and inclusive of all Council of Europe bodies. Yet, as the draft proposal attempts to ease the inter-institutional tensions between PACE and the CM, it overlooks the role of the European Court of Human Rights in defending the European human rights system.

## The Need for a Complementary Sanctioning Instrument

When the Council of Europe was founded 70 years ago, the close-knit group of democratic founding states had introduced the option to expel state parties which seriously violate Article 3 of the Statute, namely do not respect the principles of the rule of law and human rights, and lack the sincere and effective collaboration to realize the aims of the Council of Europe ([Article 8](#)). They also included the option to suspend the right of representation of a state party which has failed to fulfill its financial obligation ([Article 9](#)). It falls into the CM's responsibilities to decide on both provisions, yet, neither were ever put into practice.

While the CM remained silent, the PACE has developed a rich and significant sanctioning practice, mostly via the [credential process](#). This practice, and its implications for participations rights such as the right to vote, was openly challenged by Russia during the last three years and resulted in a hotly disputed [reform process](#) (see debates [here](#), [here](#), [here](#)). While one might justifiably [disagree](#) with the end result of this reform (the PACE Rules of Procedure were [amended](#) to exclude the right to speak, to vote, and to be represented from its list of possible sanctions thus adapting to the Russian demands), the Russian crisis demonstrated the need for a coordinated, effective and legitimate response by all Council bodies in a situation where a state party shows blatant disregard of European values and engages in [financial blackmail](#).

Following the compromise brokered during the [Helsinki meeting](#), both the CM and the PACE

*“noted the urgent need to develop synergies and provide for co-ordinated action by the two statutory organs, in recognition of their respective mandates, in order to strengthen the Organisation’s ability to react more effectively in situations where a member State violates its statutory obligations or does not respect the standards, fundamental principles and values upheld by the Council of Europe.”*

Developing such an instrument became a cornerstone of the French CM Presidency, and President Macron [stressed](#) that the new procedure should be operational by January 2020.

## **The Draft Proposal for the Complementary Joint Procedure**

First draft proposals by the Ministers’ Deputies and PACE Rapporteur Frank Schwabe were [published](#) in December 2019. Both highlighted that the new procedure is not primarily designed as a sanctioning tool; *“the primary aim of the complementary joint procedure is to bring a member State, through constructive dialogue and co-operation, into compliance with the obligations and principles of the Organisation, and avoid imposing sanctions.”*

Most importantly, the new procedure can be initiated by three relevant organs: the CM, the PACE, and the Secretary General. It should only be implemented in the most serious, exceptional cases such as violations of Article 3 or the Preamble of the Statute of the Council of Europe, hence a high procedural threshold both for the initiation and the final decision is proposed. While a two-thirds majority is required to initiate the procedure in the CM, the PACE proposal requires the highest possible majority of at least one fifth of the component PACE members belonging to at least three political groups and fifteen national delegations. Following a motion in the PACE, the Committee on Political Affairs and Democracy will be requested to prepare a report, including a draft recommendation. The recommendation then requires a double majority of two-thirds of the votes cast and a number of votes in favor equivalent to at least one third of the total numbers of Assembly members.

In the four weeks following the initiation of the procedure, the President of the Assembly, the Chairperson of the CM, and the Secretary General will undertake a high-level mission to the member state in question to discuss the concerns with the relevant authorities. The resulting report will then be debated in the Assembly, before the CM will decide to either terminate the procedure or continue to the second stage, namely the drafting of a Roadmap by the Secretary General in the course of the next eight weeks.

The Roadmap will contain concrete actions with strict time frames for the state party to implement, as well as a list of initiatives and activities proposed by the various Council of Europe organs. The Roadmap must also be adopted by the PACE and

CM, before the implementation of the Roadmap will be coordinated by the Secretary General. In general, the implementation of the Roadmap should be finalized in nine months. In case the Roadmap does not lead to an improvement, the final decision of a possible expulsion under Article 8 remains at the CM, again requiring a two-thirds majority. However, the proposal by PACE Rapporteur Schwabe includes that the Assembly will prepare a prior report on the issue to guide the CM's decision-making.

## **The Merits and Perils of the Joint Procedure: What Role for the ECtHR?**

Both drafts stress that the new joint procedure should not replace, but complement existing instruments by providing a concerted “*credible, predictable, reactive, and reversible procedure*”. Certainly, the strict guidelines, including concrete procedural clarifications and timelines, both for the relevant Council of Europe organs and the respective state party, reflect the serious commitment of both the CM and the PACE to ease inter-institutional tensions and impose not only an effective, but also legitimate institutional procedure vis-à-vis defiant state parties. However, in order to implement this ambitious plan, several open questions remain.

First, on a procedural level, the PACE draft resolution still requires the adoption of the Assembly, which is due to debate it in January. This is decisive, as the draft proposal remains vague on the changes required in the PACE Rules of Procedure. In particular, it is not clear whether the new joint procedure affects, or even replaces, the Assembly's practice to challenge unratified credentials on substantive grounds, such as a serious violation of Article 3 ([Rule 8](#)).

Secondly, the threshold for a violation of Article 3 also remains underspecified. At this point, the complete and glaring absence of the most prominent defender of European values, the European Court of Human Rights, is particularly problematic in the draft proposal. The jurisprudence of the Court is a crucial guideline for the status of democracy, rule of law, and human rights in state parties. In particular the implementation of general measures requested in the Court's judgments could be a helpful benchmark for developing a Roadmap, and would vice versa embolden the Court's authority vis-à-vis defiant states. As the new procedure – from initiation to the implementation of the Roadmap – should take place over a time period of only twelve months, the ECtHR's expertise would decrease the organizational resources required at the CM and the PACE and hopefully ensure a swift institutional response.

Thirdly, while the current proposal has diversified the options to initiate the procedure, it still requires significant political will by a very high number of state parties. Hence, it is vulnerable to political blockade and diplomatic blackmail, and state parties will probably remain reluctant to actually initiate such a cost-intensive procedure. In order to avoid that the new procedure will share the same fate as Article 8 and 9, it might be prudent to include an automatic trigger for a debate on a possible motion to initiate a procedure at the CM, or an alert to the Secretary General. Here, the European Court of Human Rights could serve as a handy early warning system. Implementing a judicial threshold, which automatically triggers

(at least a debate on) the motion to initiate the joint procedure, for instance non-compliance with an [infringement proceeding under Article 46§4 ECHR](#) or several [Article 18 ECHR judgments](#) against a state party, could overcome a possible political blockade and provide necessary clarification on the scope of Article 3. As witnessed in the [EU's rule of law crisis](#), only a much closer cooperation between judicial and political bodies can properly safeguard the fundamental principles and values at the heart of the Council of Europe.

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